



<u>Decision Ref:</u>	2022-0330
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Tracker Mortgage
<u>Conduct(s) complained of:</u>	Failure to offer a tracker rate throughout the life of the mortgage
<u>Outcome:</u>	Rejected

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint relates to a mortgage loan account held by the Complainant with the Provider. The mortgage loan which is the subject of this complaint is secured on the Complainant's principal private residence.

The loan amount was €182,000.00 and the term of the loan was 25 years. The **Loan Offer Letter** dated **29 October 2004** provided that the interest rate applicable to the mortgage loan was a discounted variable interest rate of 3.13% for the first 24 months of the term of the loan, with the Provider's variable interest rate to apply thereafter.

The mortgage loan account was drawn down on **30 November 2004**.

The Complainant's Case

The Complainant submits that he took out a mortgage with the Provider through a third-party broker in **2004**. The Complainant states that this mortgage loan "*had a fixed rate for the first two years*". The Complainant details that after the fixed interest rate term expired, he was "*then put on to another fixed rate mortgage for a further two years*".

The Complainant outlines that he was *“first made aware”* that he could have obtained *“a better rate on a tracker mortgage”* following the *“publicity given to tracker mortgages in the media”*. The Complainant submits that after becoming aware that he could have obtained a better interest rate in the form of a tracker rate of interest, he *“felt the [Provider] had not taken [his] consumer rights into consideration”*. The Complainant states that he has either *“been on a fixed rate or a standard variable rate”* for the duration of the mortgage and states that he was *“never offered a tracker mortgage at any point – despite [the Complainant] contacting the [Provider] on a number of occasions asking for a better rate”*.

The Complainant details that he *“always felt”* that he was paying *“very high interest rates”* on his mortgage loan with the Provider. The Complainant notes that *“[w]hile the [Provider] did offer [him] slightly better interest rates”*, the Provider *“never once mentioned”* that he could have availed of a tracker interest rate or explained what a tracker interest rate was.

In addition, the Complainant submits that the Provider stopped his mortgage tax relief in **2010** and when he contacted the Provider to question why it had *“ceased passing it on to”* him, a representative of the Provider said *“[s]ure, aren’t you lucky you have received it for the past six years”*. The Complainant asserts that he does not feel that the Provider has *“acted fairly with [him]”*.

The Complainant contends that, while the Provider states that his mortgage loan documentation does not guarantee that a tracker interest rate would be made available to him in **2006**, *“there was no clause in [his] contract to say [he] would not be entitled to a tracker rate at a later date”*. The Complainant maintains that as he *“made it clear [he] was looking for cheaper options”*, he should have been informed about the option of a tracker interest rate when he contacted the Provider to discuss his interest rate options in **2006**.

The Complainant submits that *“had [the Provider] given [him] the option of a tracker mortgage, [he] would have taken it as it was the cheapest option at the time”*. The Complainant maintains that the Provider did not provide him with sufficient information regarding his interest rate options for him to be able to make an informed decision.

The Complainant states that he is unhappy with the way in which the Provider has treated him throughout the term of his mortgage loan.

The Complainant is seeking the following:

- (a) that a tracker interest rate is applied to his mortgage loan account; and
- (b) a refund of the overpaid interest on the mortgage loan account, which he submits is approximately in the sum of €31,797.53.

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The Provider's Case

The Provider outlines that the Complainant chose to engage the services of a third-party broker during the application process for his mortgage loan with the Provider. The Provider submits that, in accordance with its agreement with brokers, it was prohibited from contacting broker customers directly, *"until such a time as the customer's mortgage funds were drawn down"*.

The Provider details that the Complainant's Loan Offer Letter dated **29 October 2004**, provided for a loan in the sum of €182,000.00 repayable over a term of 25 years, with a discounted variable interest rate of 3.13% to apply for the first 2 years of the term of the loan. The Provider notes that the mortgage loan was drawn down by the Complainant on **30 November 2004**. The Provider states that there was no reference to a tracker interest rate in the Complainant's mortgage loan documentation.

The Provider submits that the Complainant availed of the services of third-party *"in respect of the completion of the legal documentation applicable to his mortgage"*. The Provider explains that the Complainant accepted the loan offer in the presence of the third-party on **24 November 2004** and in such cases, the Provider *"did not require"* receipt of the signed Loan Offer Letter.

The Provider outlines that prior to the expiry of the discounted variable interest rate period in **November 2006**, it issued a Rate Options Letter to the Complainant *"outlining the alternative interest rates available to him at that time"*. The Provider submits that a Letter of Authority/Acknowledgement Form was enclosed with this letter *"to be completed and signed should the [Complainant] have wished to avail of an alternative interest rate option as outlined therein"*. The Provider asserts that this letter also invited the Complainant to contact the Provider *"regarding any specific queries he may have had in relation to the availability of a tracker variable rate option"*. The Provider outlines that *"[d]espite extensive searches"* it has not been able to locate a copy of the Rate Options Letter that it issued to the Complainant in **November 2006**.

The Provider submits that on **29 November 2006**, the Complainant *"signed for and accepted"* a 2-year fixed interest rate of 4.54%. The Provider states that it has no record of the Complainant *"having requested a tracker interest rate"* in **November 2006**. The Provider asserts that the Complainant *"had no entitlement"* to a tracker interest rate in

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November 2006, *“as his mortgage account drew down on a discounted variable interest rate and defaulted thereafter”* to the Provider’s standard variable rate of interest, *“in line with the terms and conditions of his Loan Offer”*.

With regard to the Complainant’s submission that the Provider *“never”* offered him the option of a tracker interest rate on his mortgage loan *“despite [him] contacting [the Provider] on a number of occasions asking for a better rate”*, the Provider asserts that it *“holds no record”* of the Complainant requesting a tracker interest rate on his mortgage loan account *“during the period when tracker interest rates were available for selection”*.

The Provider states that it offered tracker interest rates from **early 2004** until **late 2008**, at which point the Provider withdrew tracker rates from its suite of mortgage products. The Provider contends that while tracker interest rates were available at the time of the Complainant’s mortgage loan application, all lending by the Provider *“is subject to commercial discretion and there was no obligation, contractual or otherwise, to offer a tracker interest rate”* to the Complainant at that time.

The Provider notes that the Complainant submits that in **2010**, the Provider *“stopped his mortgage tax relief”* and when he contacted the Provider to ascertain why this had happened, he was informed *“[s]ure aren’t you lucky to have received it for the past six years”*. In relation to this submission, the Provider outlines that it *“holds no record of the [Complainant] having contacted”* the Provider in **2010** in relation to *“mortgage tax relief in which he was informed of the above”*. The Provider states that it *“considered it important to note that any mortgage tax relief applied to the [Complainant’s] mortgage account was granted by the Revenue based on information”* that the Complainant provided to his tax office at that time. The Provider asserts that it *“is solely the [Complainant’s] responsibility to provide such information to the revenue”*.

The Provider asserts that *“at no point”* did it breach the Complainant’s consumer rights. The Provider submits that the Complainant was provided *“with all of the necessary information in order for him to make informed decisions”*. The Provider outlines that its staff *“were not authorised to and did not provide advice or recommendations”* to the Complainant in relation to the selection of interest rates. Rather, the Provider states that its staff were trained to *“provide information in relation to the various interest rate options that were available when such information was requested”*.

The Complaint for Adjudication

The complaint for adjudication is that the Provider incorrectly failed to offer the Complainant the option of a tracker interest rate at the expiry of the discounted variable interest rate period in or around **November 2006**.

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Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision, I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on **09 September 2022** outlining the preliminary determination of this Office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

In the absence of additional submissions from the parties, within the period permitted, the final determination of this Office is set out below.

Before dealing with the substance of the complaint, I note the application for the mortgage loan was submitted by the Complainant to the Provider through a third-party broker. As this complaint is made against the Respondent Provider only, it is the conduct of this Provider and not the broker which will be investigated and dealt with in this decision. Therefore, the conduct of the third-party broker engaged by the Complainant, does not form part of this investigation and decision.

In order to determine this complaint, it is necessary to review and set out the relevant documentation relating to the Complainant's mortgage loan account ending **4243**. It is also

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necessary to consider the details of certain interactions between the Complainant and the Provider in **2004** and **2006**.

The Complainant completed and signed a **Mortgage Application Form** on **20 August 2004**. Under the section titled "*Loan Details*", the Complainant sought an annuity loan in the amount of €202,000.00, repayable over a term of 24 years. Under the section "*Rate Type*", the Complainant had the option to choose from a "*variable*", "*tracker variable*", "*fixed*" or "*discount*" interest rate. The Complainant selected the fixed interest rate option and indicated a preference for a 1-year fixed interest rate.

The Provider subsequently issued a **Loan Offer Letter** to the Complainant dated **17 September 2004**, which provided for a mortgage loan in the amount of €202,000.00 repayable over a term of 24 years, commencing on a fixed interest rate of 2.74% to apply for the first year of the loan with Provider's variable interest rate to apply thereafter. However, the Complainant did not sign the **Loan Acceptance** attached to the **Loan Offer Letter** dated **17 September 2004**.

The Complainant subsequently wrote to the Provider by way of a letter dated **29 September 2004**, as follows:

"Dear Sir/Madam,

Following your letter dated 17-07-04 the loan offer 202,000.00. After careful consideration I feel the offer is much more than I actually require therefore I would be grateful if a new offer of 182,000.00, that is one hundred and eight two thousand payed [sic] back over 24 years would be more suitable for my needs. I would be grateful if a new loan offer could be drawn up, at variable rate."

The Provider subsequently issued a new **Loan Offer Letter** to the Complainant dated **05 October 2004**, which provided for a mortgage loan in the sum of €182,000.00, repayable over a term of 24 years on the Provider's variable rate of interest. Again, this **Loan Offer Letter** was not accepted and signed by the Complainant.

The Complainant wrote to the Provider by way of letter dated **18 October 2004**, which states as follows:

"Dear [Provider]

[P]lease change my loan offer, I want to borrow 182,000.00 over 25 years on the 2 year discounted variable rate"

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On foot of this request, the Provider issued a further **Loan Offer Letter** to the Complainant dated **29 October 2004**, which details as follows:

"Purpose of Loan

REFINANCE €182,000.00

Repayment Details

Loan Account

...
Loan Type: STANDARD ANNUITY
Loan Amount: €182,000.00
Interest Rate: 3.13%
Interest Type: 2 YEAR DISCOUNT VARIABLE
Term: 25 YRS
Monthly Loan Repayment €875.42 for the following 24 months
€911.37 for the following 276 months*

...
THIS LOAN OFFER REPLACES ALL PREVIOUS LOAN OFFERS"

The **Loan Offer Letter** also contained the following warning:

"Warning

...
THE PAYMENT RATES ON THIS HOUSING LOAN MAY BE ADJUSTED BY THE LENDER FROM TIME TO TIME"

The **Specific Loan Offer Conditions** to the **Loan Offer Letter** dated **29 October 2004** provide as follows:

"(3) What requires no further action

The 2yr discount rate quoted is 0.4% less than the prevailing variable interest rate and is subject to variation in accordance with mortgage terms. The interest rate will revert to the appropriate variable interest rate 24 months after the issue of the loan cheque. If the account falls more than two repayments in arrears during the discount period, the interest rate will automatically revert to the full variable interest rate and the discount rate will not be available to the Borrower thereafter.

...
In accepting this facility. I/We the borrower(s) acknowledge the following: A. That I/We are fully aware that I/We have the option of retaining my/our own independent solicitor in this matter or seeking the advice of that solicitor as to whether or not I/We should use the services of the Closing Centre B. That not withstanding this option, I/We have decided to retain the Closing Centre....D. I/We

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also acknowledge that the Closing Centre is acting on my/our behalf and not on behalf of either [the Provider] or [redacted named of company]....

(4) Other

THIS LOAN OFFER SUPERCEEDS (sic.) ALL OTHER PREVIOUSLY RELATED LOAN OFFERS."

Condition 14 of the **Provider's General Terms and Conditions** details follows:

"14. Interest Rate

(a) Subject to subsection(b), all loans are subject to the prevailing interest rate at the date the loan is drawn down. Subsequently, the interest rate may vary in accordance with the terms and conditions of the Loan Offer.

(b) In the case of a fixed interest rate Mortgage, the following conditions will apply:-

(i) The rate of interest applicable to the Loan will be fixed at the rate and for the period specified in the Loan Offer.

(ii) The Borrower on the expiry of the Fixed Rate Period may, by prior notice in writing to [the Provider], opt to choose a further fixed interest rate for a certain period if such an option is made available by [the Provider] and on the terms and conditions as may be specified by [the Provider].

*Where such an option is not made available by [the Provider] or, if available, where the Borrower fails to exercise the option, **the interest rate applicable will be a variable rate of interest which may be increased or decreased by [the Provider] at any time, and in this respect, the decision of [the Provider] will be final and conclusively binding on the Borrower..."***

While this Office has not been provided with the signed loan acceptance, the Provider submits that the Complainant accepted the loan offer on **24 November 2004**, and this does not appear to be disputed by the Complainant. The **mortgage loan account statements** submitted in evidence show that the Complainant proceeded to draw down the mortgage loan under account ending **4243** on **26 November 2004**.

The **Loan Offer Letter** dated **29 October 2004** provided for a discounted variable interest rate for the first two years of the term of the mortgage loan, with the Provider's variable

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interest rate to apply thereafter. It is worth noting that this **Loan Offer Letter** contained no reference whatsoever to a tracker interest rate that varied in line with fluctuations in the ECB base rate and did not confer any entitlement on the Complainant to be offered a tracker interest rate on the expiry of the discounted variable interest rate period or indeed at any stage during the term of the loan. In order for the Complainant to have an entitlement to be offered a tracker interest rate at end of the discounted variable interest rate period, such an entitlement would have to be explicitly provided for in the mortgage loan agreement. Furthermore, the fact that the mortgage loan documentation did not contain a provision that specifically excluded the option of being offered a tracker interest rate at any stage during the term of the mortgage loan, does not mean that the Complainant is entitled to be offered a tracker interest rate. The Complainant was contractually entitled to a two-year discounted variable interest followed by the Provider's prevailing variable interest rate.

The Provider submits that it wrote to the Complainant prior to the expiry of the discounted variable interest rate period in **November 2006** outlining the interest rate options available to him at that time. The Provider states that it has been unable to locate a copy the rate options letter that issued to the Complainant, which is disappointing. However, the Provider has furnished a **template rate options letter** which issued to customers at that time, which provides as follows:

"If you decide that a fixed rate is the best for you, simply complete the enclosed Letter of Authority and return it to us within seven days. We will then transfer your existing Mortgage to the option chosen. Should you have any specific queries in relation to re-fixing your mortgage, or the availability of tracker variable rate options, please contact us at [number redacted]."

I note that the **template rate options letter** indicated that the Complainant could contact the Provider to discuss the availability of tracker interest rates, however I have not been provided with any evidence to suggest that the Complainant contacted the Provider in this regard. Rather, the evidence shows that the Complainant completed and signed a **Letter of Authority/ Acknowledgement** on **29 November 2006** and selected a two-year fixed interest rate of 4.54%. The **Letter of Authority/ Acknowledgement** details as follows:

"Please transfer my/our existing mortgage to a fixed rate mortgage with immediate effect. I/We wish to apply for the fixed interest rate of:

- 1 Year Fixed N/A % ()*
- 2 Year Fixed 4.54 % (v)*
- 3 Year Fixed 4.70 % ()*
- 4 Year Fixed N/A % ()*
- 5 year Fixed 4.99% ()*

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10 Year Fixed 5.39% ()

Please tick as appropriate.

I/We acknowledge the following Fixed Rate Mortgage conditions:

1 FIXED TERM DETAILS

The rate of interest applicable to this loan will be fixed for the period specified.

...

3 TRANSFER FROM FIXED RATE TO VARIABLE RATE AT THE END OF FIXED NOTICE

On the expiry of the fixed term I/we may, by prior notice in writing to the [Provider], opt to choose a further fixed rate of interest for a certain period, if such an option is made available by the [Provider]. Where such an option is not available or I/We fail to exercise the option if available, the interest rate applicable will be a rate of interest which may be increased or reduced by the [Provider] from time to time and at any time in line with market interest rates (the variable rate)."

On foot of this **Letter of Authority/Acknowledgement**, the Provider issued a letter to the Complainant dated **07 December 2006**, which states as follows:

"We acknowledge receipt of your recent written request to fix the rate on the above numbered mortgage account.

We confirm that the rate has now been fixed for 2 years at 4.54% with a revised composite monthly repayment of €941.58.

This is effective from your December payment date and you will be advised of any change in TRS in due course.

We trust that this is satisfactory but please do not hesitate to contact our Customer Services Team on [number redacted] should you have any further queries".

The **mortgage loan account statements** submitted in evidence show that that a fixed interest rate of 4.54% was applied to the Complainant's mortgage loan account on **01 January 2007**.

It is clear that the Complainant accepted and signed the **Letter of Authority/Acknowledgement**, choosing to apply a two-year fixed interest rate of 4.54% to his

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mortgage loan. **Condition 14(b)** of the **Provider's General Terms and Conditions** and the **Letter of Authority/Acknowledgement** as detailed above, provide that on expiry of the fixed interest rate period, a further fixed interest rate could be applied to the mortgage loan if a fixed interest rate option was made available by the Provider and selected by the Complainant. If a further fixed interest rate option was not made available by the Provider or where made available, but not selected by the Complainant, **Condition 14(b)** and the **Letter of Authority/Acknowledgement** provide that a variable interest rate will be applied to the mortgage loan. The nature of the variable interest rate set out in **Condition 14(b)** was clearly one that could be increased or decreased by the Provider at any time. **Condition 14(b)** does not refer to the application of a tracker interest rate to the Complainant's mortgage loan on the expiry of the fixed interest rate period.

The Complainant is of the view that he was entitled to be offered a tracker interest rate at the end of the discounted variable interest rate period in **November 2006**, as tracker interest rates were available from the Provider at that time. The fact that the Provider was offering tracker interest rates to new or existing mortgage customers in **2006**, did not create an obligation, contractual or otherwise, on the part of the Provider to offer a tracker interest rate to the Complainant on his mortgage loan account in **November 2006**. Furthermore, while the Provider could provide information to the Complainant on its product offerings in **2006**, the decision as to which interest rate to select out of the interest rate options available for selection, rested solely with the Complainant. The Provider was under no obligation to offer the Complainant advice with respect to interest rates. If the Complainant wanted independent advice about interest rates available in the market in **2006** or indeed at any other time, the Complainant could only get that advice from an independent third-party advisor.

The terms and conditions of the **Loan Offer Letter** dated **29 October 2004**, which were accepted by the Complainant, detailed what would transpire at the end of the discounted variable interest rate period. The **Specific Loan Offer Conditions** provide that on expiry of the discounted variable interest rate period in **2006**, the mortgage loan would convert to the Provider's prevailing variable interest rate. As such, the Provider was under no contractual obligation to offer the Complainant a tracker interest rate on mortgage loan account ending **4243** in **November 2006**. The Provider however wrote to the Complainant prior to the expiry of the discounted interest rate period to inform him of alternative fixed interest rate options that he could choose from instead of having his mortgage loan default to the Provider's variable rate of interest. The Complainant subsequently chose to apply a 2-year fixed interest rate of 4.54% to his mortgage loan account and this was a choice that was freely made by the Complainant

Having reviewed the mortgage loan documentation and submissions made by both parties, I am satisfied that the Complainant did not have a contractual entitlement to be

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offered a tracker interest rate on the expiry of the discounted variable interest rate period in **November 2006**, or at any time during the term of the mortgage loan.

For the reasons outlined above, I do not uphold this complaint.

Conclusion

My Decision pursuant to **Section 60(1)** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is rejected.

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.



**JACQUELINE O'MALLEY
HEAD OF LEGAL SERVICES**

04 October 2022

PUBLICATION

Complaints about the conduct of financial service providers

Pursuant to **Section 62** of the ***Financial Services and Pensions Ombudsman Act 2017***, the Financial Services and Pensions Ombudsman will **publish legally binding decisions** in relation to complaints concerning financial service providers in such a manner that—

(a) ensures that—

- (i) a complainant shall not be identified by name, address or otherwise,
 - (ii) a provider shall not be identified by name or address,
- and

(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.

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Complaints about the conduct of pension providers

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will **publish case studies** in relation to complaints concerning pension providers in such a manner that—

(a) ensures that—

(i) a complainant shall not be identified by name, address or otherwise,

(ii) a provider shall not be identified by name or address,

and

(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.